KBO, Inc., a wholly-owned subsidiary of Klosterman's Baking Company *and* Bakery, Confectionery & Tobacco Workers International Union, Local 57, AFL–CIO. Cases 9–CA–29905 and 9–CA–29992

November 10, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On March 9, 1994, Administrative Law Judge Bruce C. Nasdor issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge dismissed the complaint allegation that the Respondent violated Section 8(a)(3) and (1) of the Act when, in the context of a union organizing campaign, it disciplined employee Rory Barnhart[2] for making remarks concerning the Respondent's business practices to other employees. The General Counsel excepts, contending that Barnhart's remarks were protected by Section 7 of the Act. We find merit in the General Cousel's exception.

Early in 1992, Barnhart contacted the Union, which subsequently began an organizing campaign among the Respondent's employees. Barnhart persuaded employees to sign union cards and attend union meetings and was open about his support for the Union in discussions with the Respondent's supervisory staff.

On September 16,[3] 1992,[4] Barnhart had a conversation with employees Dave Abshear, the employees' ''round table'' representative,[5] and Mark Horton. Abshear testified that Barnhart told them that Union representatives had a tape recording in which Mike Outlaw, the Respondent's operating manager, stated that the Respondent was ''taking money out of the employees' profit sharing accounts to pay the lawyers to fight the Union.'' Abshear asked Barnhart for the tape. He also reported Barnhart's remark to Carol Mullin the Respondent's vice president for human resources.

On September 17, Barnhart was called to a meeting with Mullin and Plant Manager Robert Minshall. They asked Barnhart about his previous day's conversation with Abshear and Horton, and Barnhart admitted telling them about the tape recording of Outlaw's remarks. Mullin told Barnhart that taking money out of the employees' profit-sharing accounts ''would be the same as lying and cheating and it was a real threat to the whole integrity of the company.'' Mullin testified that Barnhart responded that the Company ''had lied and cheated the people in the past. He felt it was his role to let everyone know what was going on.'' Mullin asked Barnhart if he had the tape or could produce it. Barnhart initially stated he had it, but then stated he did not. Minshall suspended Barnhart until he produced the tape. Three days later, however, Barnhart was allowed to return to work although he never produced the tape.

The judge found that Barnhart raised and disseminated to employees a serious criminal charge against the Respondent, and that he did not make a serious effort to ascertain whether the tape substantiating the charge existed. The judge found that Barnhart's remarks were made ''in a reckless disregard for the truth'' and were thus unprotected. We disagree.

It is undisputed that Barnhart's remark to Abshear and Horton about the contents of the tape occurred in the context of a discussion of working conditions and the Union's organizing campaign. As such, the remark occurred within the context of activity clearly protected by Section 7 of the Act. Under well-settled Board law, Barnhart's remark would also be protected unless it was ''so offensive, defamatory or opprobrious'' as to remove it from the protection of the Act. *Ben Pekin Corp.*, 181 NLRB 1025 (1970), enfd. 452 F.2d 205 (7th Cir. 1971); *Dries & Krump Mfg.*, 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976). A statement which is alleged to be libelous or defamatory will not lose its protection unless it is made ''with knowlege of its falsity, or with reckless disregard of whether it was true or false.'' *Linn v. United Plant Guard Workers*, 383 U.S. 53, 61 (1966). Contrary to the judge we do not find Barnhart's remark so defamatory or opprobrious as to render it unprotected.

Employee Trent Wright testified, without contradiction, that he told Union Representative John Price that he had a tape of Outlaw stating that the Respondent's

[1] The General Counsel has excepted to some of the Judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderence of all relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's dismissal of the allegation that Plant Manager Robert Minshall unlawfully interrogated employee Karen Rankin, we rely solely on the judge's credibility finding that the alleged interrogation did not occur.

[2] The judge in his decision incorrectly referred to Barnhart as ''Barnhard.''

[3] The judge in his decision incorrectly stated that this conversation took place on August 16 rather than September 16.

[4] All dates herein are in 1992, unless otherwise specified.

[5] The ''round table'' is a group of employees who serve as a liaison to management.

antiunion campaign was being financed from the employees' profit-sharing accounts. Barnhart testified, without contradiction, that Price told him about the tape recording and its contents. In this context, it is readily apparent that Barnhart, in his conversation with Abshear and Horton, was simply relaying to them in good faith what he had been told by Price, and that he reasonably believed the report to be true. Neither the fact that Barnhart had not himself heard the tape nor that the information may have been inaccurrate removes Barnhart's remark from the Act's protection.[6] *Ben Pekin*, supra; *Dries & Krump Mfg*., supra; *Cement Transport*, 200 NLRB 841, 846 (1972), enfd. 490 F.2d 1024 (6th Cir. 1974), cert. denied 419 U.S. 828 (1974). *American Shuffleboard Co*., 92 NLRB 1272, 1274–1275 (1951), enfd. 190 F.2d 898 (3d Cir. 1951). Accordingly, we find that the Respondent's suspension of Barnhart because of this remark violated Section 8(a)(3) and (1) of the Act, as alleged.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By suspending its employee, Rory Barnhart, on October 17, 1992, the Respondent has violated Section 8(a)(3) and (1) of the Act.

4. This unfair labor practice affects commerce within the meaning of Section 2(5) of the Act.

THE REMEDY

Having found that the Respondent violated 8(a)(3) and (1) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found the Respondent discriminatorily suspended Barnhart, we shall order that the Respondent make Barnhart whole for any losses of wages and benefits he may have suffered from the date of his suspension to the date he returned to work. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, KBO, Inc., a wholly-owned subsidiary of Klosterman's Baking Company, Springfield, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending employees because of their union support or union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the excersise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Rory Barnhart whole for any loss of wages and benefits he may have suffered due to the discrimination practiced against him in the manner prescribed in the remedy section of this decision.

(b) Expunge from its personnel records or other files any reference to its suspension of Rory Barnhart and notify him in writing that this action has been taken and that evidence of the discipline will not be used as a basis for future personnel actions against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all records necessary to analyze and determine the amount or amounts due Rory Barnhart under the terms of this Order.

(d) Post at its facilities at Springfield, Ohio, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 9, upon receipt shall immediately be signed and posted by Respondent's authorized representative and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure the notices are not altered, defaced, or covered by other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[6] Contrary to the judge, we do not find that Barnhart had an independent obligation to investigate whether the tape actually existed.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT suspend you because of your union support or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Rory Barnhart whole for any loss of wages and benefits he may have suffered due to the discrimination practised against him, less any interim earnings, plus interest.

WE WILL expunge from our personnel records or other files any reference to our suspension of Rory Barnhart and notify him in writing that this action has been taken and that evidence of the suspension will not be used as a basis for future personnel actions against him.

KBO, INC., A WHOLLY-OWNED SUBSIDIARY OF KLOSTERMAN'S BAKING COMPANY

Engrid Emerson Vaughn, Esq., for the General Counsel.
Charles H. Hollis, Esq. and *Rebecca G. Moore, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge. This case was tried in Springfield and Dayton, Ohio, on March 2 and October 13, 1993. The original charge in Case 9–CA–29905 was filed by the Union on September 3, 1992, and the amended charge in Case 9–CA–29905 was filed on October 19, 1992. The original charge in Case 9–CA–29992 was filed by the Union on September 28, 1992, and the amended charge in that case filed by the Union on October 15, 1992. An order consolidating cases, amended consolidated complaint and notice of hearing issued on February 4, 1993. The complaint alleges certain independent acts of Section 8(a)(1) of the Act and that Respondent committed an unfair labor practice by disciplining Rory Barnhard. It is also alleged that Respondent committed unfair labor practices by issuing written warnings to James Gilbert and Larry Sipe.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Respondent, has been engaged in the production and distribution of baking goods out of its Springfield, Ohio facility.

During the preceding 12 months, Respondent, in conducting its operations described above, purchased and received at its Springfield, Ohio facility goods valued in excess of $50,000 directly from points outside the State of Ohio.

At all times material herein, Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

At all times material herein, Bakery, Confectionery and Tobacco Workers International Union, Local 57, AFL–CIO–CLC has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent operates bakeries at four locations in the States of Ohio and Indiana including one at Springfield, Ohio, the facility involved herein.

Early in 1992,[1] the Union commenced an organizational campaign among the Respondent's employees. Rory Barnhard initially contacted the Union, persuaded employees to sign cards and attended union meetings. He did not hide his prounion sentiments and testified that he even discussed these sentiments with supervisors.

On September 17, Respondent suspended Barnhard and then on September 21, issued him a ''final warning notice,'' allegedly arising out of an incident that occurred on September 16.

The evidence firmly establishes that on August 16, Barnhard engaged in a discussion with two coworkers, Dave Abshear and Mark Horton. Barnhard initiated the conversation and Abshear also testified that he, Abshear, was the employees' ''round table'' representative. The round table is a group of employees who act as a liaison with management. During the conversation, Barnhard told these two employees that union representatives had a tape recording of Respondent's operational manager, Mike Outlaw, stating that the company was using employee profit-sharing money to pay for the antiunion campaign and the antiunion lawyers. This is established in Barnhard's testimony as well as the testimony of employees Abshear, Horton, and Carol Mullin, vice president of human resources, and Robert Minshall, plant manager. Barnhard contends that he advised the employees that the money was being taken out of the Company's profits rather than out of profit-sharing money, that had already been put in the employees' profit-sharing accounts.

Barnhard acknowledged that the day after his conversation with Abshear and Horton he met with Carol Mullin, vice president of human resources, and Bob Minshall, plant manager. During this meeting, he admitted to them that he told Abshear and Horton about the tape recording of Mike Outlaw's voice. Barnhard testified that Mullin informed him that he was raising a serious criminal charge against Respondent, because it is illegal for the Company to take money out of employees' profit-sharing accounts. Barnhard advised Mullin and Minshall that he learned of the tape recording from John Price, a union representative. According to Barnhard, he received this information at a union meeting. Over a period of 5 months, Barnhard avers that he repeatedly asked Price to produce the tape, but Price did not do so. Barnhard testified he told Mullin and Minshall that he did not have the tape. Accordingly, Respondent, because of Barnhard's admitted

[1] All dates are in 1992 unless otherwise specified.

misconduct, decided to suspend him until he produced a tape, and it was verified that Outlaw's voice appeared on the tape. Although Barnhard didn't produce the tape he was allowed to return to work after his 3-day suspension.

When he returned to work he was asked to sign a written warning which in essence is a final warning, stating that if any further conduct in which he blatantly lied about his employer and any other gross misrepresentation of facts about the Company would result in his termination.

Barnhard refused to sign the final notice as well as the suspension notice given him on September 17.

In his testimony, Barnhard admitted that during his meeting with Mullin on September 17, he told her that the Company had lied and cheated the employees. He also testified that he believed Price, the union representative, because the Union had never lied to him.

The testimony of Abshear, an employee of 6 years, contradicts that of Barnhard. Abshear testified that on September 16, Barnhard approached him in the parking lot and told him he possessed a taped recording of Mike Outlaw's voice saying that the money was being taken out of the profit-sharing accounts to pay the lawyers to fight the Union. Abshear did not believe Barnhard and asked him to produce the tape. Abshear, fearing that Barnhard was misleading employees reported this conversation to Mullin who assured him she would investigate. She also put Abshear's statement in writing.

Horton also recalled Barnhard saying he had a tape recording containing statements that the Company was taking money out of employees' profit-sharing accounts. Barnhard promised he would produce the tape but never did. Horton also met with Mullin and signed a statement recounting his recollection of the conversation with Barnhard.

Mullin testified that she assured Abshear and Horton that the Company's attorneys were paid out of profits but not out of money already placed in employees' profit-sharing accounts.

Mullin testified about the meeting with Minshall, Barnhard, and herself. According to her testimony, she and Minshall asked Barnhard a couple of times and he said it was money allocated to the people which was now being taken out. Furthermore, she testified that they told Barnhard that this would be the same as lying and cheating and it was a threat to the integrity of the Company. Barnhard responded that the Company had lied and cheated the people in the past, and he felt it was his role to let everyone know what was going on.

Minshall's testimony corroborates Mullin's account of the meeting. Minshall testified, ''He (Barnhard) stated that money had been taken out. He stated that Mike says the money was taken out of the profit sharing accounts. He has the tape and we had lied and cheated people for years, that he was going to let them know.''

Counsel for the General Counsel's witness, Trent Wright, testified that Outlaw had said in a speech to employees during a union campaign at a bakery in Morristown, Indiana, that the Company was taking money from the profit-sharing accounts of employees to pay the Company's lawyers.

Counsel for the General Counsel then called Darlene Thompson to testify on direct examination that Outlaw had stated to the same assemblage at Morristown, Indiana, that the expenses for the Company's campaign to frustrate the Union's efforts to get into the plant would come ''out of the company's profits.''

Disciplinary Warnings to Gilbert and Sipe

On August 18, Respondent issued disciplinary reports to Larry Sipe and James Gilbert allegedly for being in the production area of the bakery under the influence of alcohol, disrupting the work of other employees, such conduct being a direct violation of written company policy. Both employees refused to sign the disciplinary reports.

Both Gilbert and Sipe contend that they stopped by the bakery on the evening of Wednesday, August 17, in order to check Sipe's uniforms for the next day.

On August 17, Gilbert and Sipe met at Wayside Tavern where they shared five or six pitchers of beer. Gilbert testified that he drank approximately one pitcher of beer himself. Sipe admitted he had a ''buzz'' when he left the tavern. After leaving the tavern, they made several stops including one at a shopping mall, where they each had another ''keg'' cup of beer. Within approximately an hour of drinking their last beer they arrived at the company plant. Upon their arrival at the plant both Gilbert and Sipe admit in their testimony that they ''had a buzz'' from drinking numerous beers during the day.

Sipe and Gilbert testified that no production was going on at the time they arrived at the plant. The evidence discloses that regularly scheduled sanitation maintenance was occurring during the entire time they were in the plant.

Before entering the plant, they spoke with two maintenance employees Kleismit and Cautrell. Kleismit had been a leadman for 3-1/2 years. They then entered the plant passing through the production area of the plant, walking through the center of the plant under the bread cooler. Gilbert testified that they stopped and spoke with employees who were working on the overhead bread line. He testified that he spent 5 minutes talking with employee Robinson inside the plant. Then, according to Gilbert, he went outside and spoke with employees who were on their break time. His testimony is that they were at the plant for a total of 35 to 40 minutes, 5 to 10 minutes inside and 30 minutes outside the plant.

Sipe testified that he does not recall whether he spoke with employees Robinson and Frock inside the plant. He specifically recalled speaking to Robinson and Frock outside the plant. Sipe admitted he may have told Frock that he had been drinking. According to Sipe they spent a total of 15 to 20 minutes inside the plant talking to people. Sipe testified that their total time spent was approximately 30 minutes. Sipe also readily acknowledged that he was unsure whether the alcohol he had consumed may have affected his ability to recall.

Gilbert testified he was called into Minshall's office and admitted that he had gone into the bakery after having a few beers. He was issued a written warning by Minshall but he did not read it. Sipe also was issued a written warning. He testified that Minshall told him that the reason for the warning was to prevent any future similar incidents. Sipe testified that Minshall did not say anything to him to make him believe that he was disciplined because of his union activities.

Kleismit testified he noticed Gilbert and Sipe in the bakery for approximately 30 to 35 minutes. He stated that they were walking throughout the plant talking to sanitation and maintenance workers who were on duty. Later, while Kleismit

was on break outside the plant, Gilbert approached him and other maintenance employees and talked to them about signing union cards. Kleismit testified he could smell alcohol on Gilbert's breath and he noticed Sipe's speech was slurred. The next day he reported the incident to his supervisor.

Frock, a sanitation employee for 8-1/2 years, also testified that he was in the middle of the plant working when Sipe and Gilbert approached him. He testified that the two appeared to be drunk. He stated he spoke to Gilbert for approximately 20 minutes inside the plant, and he asked Sipe and Gilbert if they had been drinking. According to Frock they responded that they had been drinking but they weren't drunk.

Robinson, a lead person in sanitation for approximately 2 years, testified that while he was doing his job picking up bread crumbs, Sipe and Gilbert walked in and started talking to him about the Union. According to him they spoke with him for approximately 20 to 25 minutes before asking him and other employees if they would like to go outside and continue the conversation. Robinson testified, ''They were just mainly, you know, more or less just coming in and bugging us is more or less what happen.'' According to Robinson he and the other employees all stopped working to talk to Gilbert and Sipe. He said he knew they had been drinking from the alcohol smell on their breath, red eyes, and the way they talked.

Minshall interviewed Robinson and Kleismit as to what they observed on August 17. According to Minshall, Robinson and Kleismit told him that when Gilbert and Sipe came into the plant they could smell alcohol on their breath, they were loud, their eyes were bloodshot and their speech was slurred. They were loud and they were going from place to place in the plant. Based on these accounts and Gilbert's and Sipe's admissions, Minshall issued the written warnings to them that any repeat violation of the Company's alcohol policy would result in their dismissal.

Documentary evidence and the testimony of Minshall established that it is against company policy for any one to be in a workplace while under the influence of alcohol. During the 2-1/2 years he has been plant manager, Minshall testified he has not had to discipline anyone for being under the influence of alcohol except Gilbert and Sipe.

Mullen testified that at least two other employees had been terminated for being under the influence of alcohol at the workplace, prior to Minshall being appointed to plant or operations manager. Respondent's written policy on illegal drugs and alcohol in the workplace prohibits the use or possession of alcohol ''on company premises.'' The policy also provides that no employees shall report to work while under the influence of alcohol. Minshall testified the primary reason for the Company's policy was to promote the safety of the employees. Accordingly, Respondent contends that with the many pieces of machinery in the bakery, employees who are under the influence of alcohol or drugs, either on or off duty, pose a threat to their safety and the safety of their coworkers.

Sipe and Gilbert admit that they were aware of the Company's drug and alcohol policy. Gilbert testified he did not believe it was a violation of the Company's policy to be in a production area of the plant while under the influence of alcohol as long as he was off duty. Sipe conceded that it was, ''bad judgment'' to be in a production area of the plant under the influence of alcohol.

The Independent 8(a)(1) Allegations

Karen Rankin was an employee of Respondent who was discharged in September 1992, allegedly for harassing other employees. Unfair labor practice charges were filed and subsequently dismissed. Rankin testified that during April, Minshall approached her and asked her if she was going to the beer party. When she asked what beer party he allegedly responded, the one that the Union was going to give. It was generally known that the Union held meetings at a local Ponderosa Steak House in Springfield, Ohio. Rankin testified that the conversation with Minshall took place in the employee breakroom in the presence of other employees, and she did not feel threatened or intimidated by Minshall's question. Minshall testified he never asked whether an employee planned to attend any union functions. Rankin testified further that during late June or July, Supervisor Tim Hook approached her while she was talking to Barnhard, and asked her was Rory trying to gear her up for a steak dinner. Barnhard corroborated Rankin's testimony in this regard. As stated earlier, union meetings were often conducted at the Ponderosa Steak House. Rankin acknowledged that Hook never mentioned the Union to her and she did not feel threatened or intimidated by Hook's comment. Hook did not testify.

No evidence was adduced to support the allegation that Carol Mullen interrogated an employee in violation of Section 8(a)(1) of the Act.

Conclusion and Analysis

In my view, unquestionably, Barnhard raised and disseminated to at least two coworkers a serious criminal charge against Respondent. He had 5 months to produce the tape, but failed to do so. He was suspended for 3 days but allowed to return to work, although he failed to produce any tapes.

In my opinion, Respondent's actions were mild and more than justified, considering the seriousness of Barnhard's offense.

I discredit Barnhard and his attempt to alter profit-sharing accounts to ''profit sharing money.'' Barnhard, based on my observations, exuded irresponsibility and a proclivity to obfuscate.

By contrast, Abshear, Horton, Mullen, and Minshall were candid and exacting in their testimony. They made sincere efforts to recount incidents accurately and forthrightly. Therefore, I credit them.

Barnhard did not, in my opinion, even make a serious effort to ascertain the truth, i.e., did such a tape exist? It is clear to me that Barnhard told his coworkers that the Respondent was taking money out of employees' profit-sharing accounts. His statements were made in a reckless disregard for the truth and Respondent's reputation.

The Act does not protect such conduct.

Respondent's discipline of Barnhard occurred after making a thorough investigation.

I am convinced by the preponderance of the evidence that Respondent has met the *Wright Line* burden (251 NLRB 1083 (1980)) standards, although it is clear to me that Barnhard's conduct was unprotected from the beginning.

Accordingly, I recommend that the allegation that Respondent disciplined Barnhard because of his union and/or concerted activity, in violation of Section 8(a)(1) and (3) of the Act be dismissed.

Respondent, by clear evidence, established that Mullen and Minshall investigated and substantiated employee reports that Gilbert and Sipe, although off-duty, were in the production areas of the bakery under the influence of alcohol, disrupting the work of other employees. Their actions violated written company policy.[2] Moreover, they were aware of this policy. Respondent therefore issued written warnings to them for their conduct on August 17. Gilbert and Sipe both admitted drinking numerous beers during the day, to the point where they ''had a buzz'' when they reached the bakery. Sipe testified he was ''dazed.'' Sipe and Gilbert contended that no production was occurring while they were present. The overall evidence reflects that regularly scheduled maintenance and sanitation were being performed, while they were present.

Sipe and Gilbert spoke to employees on break outside the bakery and they spent 15, 20, or 30 minutes inside the bakery talking to employees who were working.

Employee Kliesmit testified that they were in the bakery 30 to 35 minutes talking to employees about signing union cards, and that Sipe's speech was slurred, and Kliesmit smelled alcohol on his breath.

Employee Frock testified that both Sipe and Gilbert appeared to be drunk. Employee Robinson testified that they were ''bugging'' the employees.

These employees were credible and did not evidence a negative attitude toward Sipe or Gilbert.

It is clear that employees ceased work to talk to Sipe and Gilbert.

Minshall interviewed Robinson and Kliesmit as to their observations. Based on this, he issued written warnings to them that any repeat violations of Respondent's policy would result in their dismissal.

Minshall's unrefuted testimony is that during his 2-1/2 years as plant manager, he had not had to discipline anyone, other than Gilbert and Sipe, for being under the influence of alcohol. Mullen was aware of two employees terminated for being under the influence of alcohol ''on company premises.''

Minshall testified that safety of employees was the main reason for the policy.

Suffice it to say there are various types of machinery in the bakery posing a real threat to employee safety.

There is no evidence of disparate treatment. Indeed, the warnings to Sipe and Gilbert were more lenient than the policy calls for, and they were treated more leniently than other employees under similar circumstances.

Where there is any conflict in the testimony of Gilbert, Sipe, and Respondent's witnesses, I resolve the conflict in favor of Respondent's witnesses. Sipe and Gilbert impressed me as witnesses who disregarded the truth, in a joint effort to fabricate violations.

[2] Policy provides for suspension or dismissal.

Sipe and Gilbert averred that they stopped at the bakery to check on Sipe's uniform for the next day. Their conduct at the bakery belies this contention. Assuming arguendo, that this was true, it does not excuse their blatant disregard for company policy.

I conclude that Respondent has met its *Wright Line* burden. Accordingly, I recommend that the allegations that Respondent disciplined Sipe and Gilbert because of their union and/or concerted activities, in violation of Section 8(a)(1) and (3) of the Act be dismissed.

Karen Rankin testified that in the employee breakroom, with other employees present, Minshall asked her if she was going to the Union's beer party. She testified she did not feel threatened or intimidated in any way by Minshall's question. Minshall testified he never asked any employees whether they planned to attend a union function.

I have concluded that Minshall is an employee to be credited. Conversely, Rankin, an employee who had filed an unfair labor practice charge against Respondent, which was subsequently dismissed by the Regional Director, impressed me as an employee with an ax to grind and perhaps motivated by a sense of revenge. I discredit her.

Moreover, even assuming arguendo that Rankin's testimony is true, I conclude that this does not rise to the level of illegal interrogation. I consider it a mere isolated incident, if true. Accordingly, I recommend that this 8(a)(1) allegation be dismissed.

Rankin testified that while she was talking to Barnhard, Supervisor Hook asked her if Barnhard was ''gearing her up for a steak dinner'' at the Ponderosa Steak House, where the Union usually held its meetings. She testified that she asked Hook to explain his comment and he responded by telling her not to worry about it. She also testified that Hook never mentioned the Union to her and she didn't feel threatened or intimidated by the comment. Hook did not testify. I consider Hook's comment innocuous at best. Moreover, I also do not view this as rising to the level of illegal interrogation. Accordingly, I recommend that this 8(a)(1) allegation be dismissed.

Paragraph 5(c) of the complaint alleges that Mullen violated Section 8(a)(1) of the Act by interrogating an employee on or about September 11. No evidence was presented to support this allegation and accordingly I recommend that it be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The allegations of the complaint, that the Respondent has engaged in conduct violative of Section 8(a)(1) and (3) of the Act, have not been supported by substantial evidence.

[Recommended Order for dismissal omitted from publication.]